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CONSTITUTIONAL JUSTICIARY (PROCEDURAL) RIGHTS: TOWARDS IDENTIFYING AND UNDERSTANDING THE PHENOMENON

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Subject. The article is devoted to the study of the existence of an independent group of human rights – human rights in the sphere of justice, also called constitutional justiciary rights. These rights are enshrined in the constitutional acts of modern states and guaranteed at the international legal level in a number of universal instruments and regional conventions on the protection of human rights. The consolidation and implementation of these rights is intended to ensure, with the help of judicial procedures, the reality of the constitutionalism regime and social justice in specific cases considered by the courts.
Purpose of the study. The article aims to prove the existence of constitutional judicial rights as a category of current law.
Methodology. The article relies on the wide application of comparative legal, historical legal and formal dogmatic methods. The historical legal method made it possible to trace the consolidation of judicial rights in the constitutions of England, the USA, France, Italy and Germany in the 18th-19th centuries. Using the comparative legal method, the constitutions of the modern world were studied and a quantitative rating of the prevalence of these rights was compiled. The formal dogmatic method made it possible to define approaches to the theoretical study of this group of human rights.
Conclusions. An independent group of human rights – justiciary rights – exists and is subject to allocation (recognition) as part of the general legal status of an individual. Such rights is defined as human rights realized in the field of justice.

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1. Introduction

Legal norms of national constitutions include a large number of provisions, which are analyzed in great detail by legal scholars. On the basis of constitutional provisions, in the best traditions of legal positivism, national legal doctrines are formed, which reveal the content of constitutional provisions and develop their constituent meanings. Against this background, the provisions of Articles 46-53 of the Russian Constitution which determine the legal status of the individual in the sphere of justice attract special attention. Russian legal scholarship has not developed an unambiguous idea of this group of constitutional norms, or, to be more precise, whether they constitute a separate group of human rights or not.

On the one hand, the named array of constitutional norms includes more than a dozen provisions, which, by the way they are formulated, are nothing other than human rights or subjective rights which do not differ in any way from other rights mentioned earlier in the Constitution of the Russian Federation that have the status of universally recognized independent groups of human rights (for example, personal, political, economic or social).

On the other hand, legal scholarship contains very strong stances denying the possibility of singling out an independent group of human rights in the field of justice. Thus, E.A. Lukasheva, recognizing the possibility of including procedural rights in the legal status of an individual, sees procedural rights as objective principles of legal proceedings, which, in her opinion, cannot be included in the legal status of an individual, but should be regarded as its guarantees [13, p. 92]. Probably, this opinion is a disagreement with the position of the Federal Constitutional Court of Germany, which noted that “in the sense of the Basic Law not only the primary procedural right of a person, but also the objective legal principle of court proceedings is constitutional and fundamentally inalienable” [4, p. 180].

In scholarly literature on constitutional law, the above-mentioned body of constitutional provisions is named differently. For example, S.A. Avakyan calls them “fundamental rights aimed to protect other rights and freedoms of citizens” [1, p. 784], S.V. Narutto and S.E. Nesmeyanova - “guarantees of constitutional rights and freedoms of a person and citizen” [12, p. 200-209; 7, p. 155-164].

The widespread mentioning of the category of human rights in the sphere of justice (also called constitutional justiciary rights) as an independent group of human rights is not common for the Russian scholarly literature: according to our observations, the first person who proposed to use such a category more than 20 years ago was T.G. Morshchakova [9-10; 11, p. 424; 13, p. 325-347], later this phenomenon was emphasized by N.S. Bondar [3, 4].

Such state of affairs in science opens the issue of the possibility of the existence of an independent group of human rights - human rights in the sphere of justice (constitutional justiciary rights or simply justiciary rights) for discussion. Using simple statements about the number of these rights and their social significance as arguments in favor of the thesis outlined above are clearly insufficient.

2. Constitutional Justiciary Rights - the Concept of Former and Current Law?! (Towards Identifying the Phenomenon)

Justification of the thesis about the independence of constitutional justiciary rights should begin with a discussion of their existence in the current positive law: if they are not represented in the legal reality, it would be meaningless to talk about their recognition. Hence, first of all, it is necessary to consider the enshrinement of justiciary rights at the constitutional level of legal regulation.

2.1. Level of National Constitutions

Historically, the first enshrinement of human rights at the constitutional level occurred in the New and Modern times (late 18th century - early 19th century) with the appearance of constitutional acts of the first bourgeois states.

A certain exception to this background is England and its constitutional system, which began with the signing of the ***Magna Carta in 1215.*** It was Magna Carta that historically consolidated the first provisions on human rights in the field of justice and principles of fair trial [14, p. 189; 15]. The provisions established back then are still relevant today – the prohibition of arbitrary arrests and punishments (Art. 39), procedures for the appointment of judges and criteria for their selection (Art. 45), the right of barons to trial by jury (Art. 52) [6, pp. 15-22].

Another historically important document enshrining human rights in the field of justice was the ***U.S. Constitution of 1789.*** [6, pp. 188-195], and more precisely – the first amendments to it – "Articles supplementing and amending the Constitution of the United States of America, proposed by Congress and approved by the legislatures of the individual states in accordance with the Fifth Article of the original Constitution", called the Bill of Rights. These provisions outlined an extensive catalog of human rights. Specifically, Article IV proclaimed freedom from arbitrary search and seizure, Article V - the elements of *due process*, including bringing criminal charges based on a grand jury decision, prohibition of double jeopardy, freedom from self-incrimination, principle of conducting a fair trial in accordance with the law. Article VI provides for a more detailed list of human rights: the right to a speedy and public trial, to an impartial jury, to the jurisdiction established by law, to be informed of the substance of the charge, to confront witnesses against the accused and to call their own witnesses, as well as the right to qualified legal assistance.

Another famous legal act that enshrined human rights, but already on the European continent – the Declaration of the Rights of Man and Citizen, which became part of ***the French Constitution of September 3, 1791***, contained quite specific provisions concerning justice: detention, arrest and punishment solely on the basis of the law and in compliance with the forms prescribed by law (paragraphs 7 and 8 of the Declaration), the presumption of innocence (paragraph 9 of the Declaration). Subsequent constitutional clauses (Chapter 5 "On the Judiciary") secured provisions concerning the status of citizens involved in the sphere of justice. The following provisions could be named: one cannot be deprived of jurisdiction established by law (p. 4), the right to trial by jury in criminal cases (p. 9), the right to be released from custody on bail (p. 12) [6, p. 275-277].

The ***Statute of the Italian Kingdom of March 4, 1848*** stipulated freedom from arbitrary detention and conviction, duty of state bodies to conduct proceedings in courts in accordance with the law (Art. 26), right of everyone to a lawful (natural) court (Art. 71) as human rights [6, p. 470, 474]. The rest of the equally important provisions on justice were formulated as principles or as norms of customary law.

Another constitution of that time, the ***Constitution of the German Empire of March 28, 1849***, contained Division IV "Fundamental Rights of the German People," where Article 10 was placed, concerning court proceedings. It provided that no one could be removed from the jurisdiction of his lawful judge (§ 175), everybody were equal before the law and the court (§ 176), and that court proceedings should be public and oral (§ 178) [6, pp. 541-542].

A distinctive feature of these constitutional acts of the New Time was a

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relatively small volume of legal provisions formulated as human rights ("everyone has the right...", "no one can be deprived of the right..."), while the rest of the constitutional text was occupied by provisions describing the structure and procedures of various state bodies, including norms on the independence and autonomy of the judiciary, irremovability of judges, publicity of trial, the possibility of state interference with individual personal rights based only on judicial decisions. Probably, for this reason the idea of singling out a separate group of human rights in the sphere of justice was not widely recognized, since the way many constitutional provisions on justice were formulated did not allow for claiming specific enshrinement of human rights.

Such an approach, where the instrumental part of the constitution prevails over the social one, began to change over time, and the constitutions of national states adopted in the XIX-XX centuries were called *social-instrumental constitutions*, because they contained a more extensive catalogue of human rights, including those in the field of justice [8, p. 62].

Summaries of existing national constitutional acts (as a rule, developed in the form of codified constitutions) and comparative legal studies of these texts have been undertaken by various scholars and organizations,[1] and therefore their work on summarization will be useful for our study. For example, the information resource "*Constitut*" accumulates 193 English-language texts of codified constitutions of the overwhelming majority of countries of the modern world, which are categorized in a cross-cutting manner by subject matter. This resource contains a section "*Rights and Duties*", which includes a group of "*Legal Procedural Rights*", understood, in fact, as the justiciary rights we are looking for. The commonality of these provisions is as follows:

- the right to protection from arbitrary arrest and detention – in 183 constitutions;
- prohibition of retrospective use of the law establishing criminal liability – 169;
- the right to qualified legal assistance – in 168;
- prohibition of punishment not based on law in force – in 163;
- presumption of innocence – in 155;
- the right to participate in the gathering of evidence – in 148;
- right to a public trial – in 140;
- right to a speedy trial (justice within a reasonable time) – in 111;
- the right to a fair trial (protection against unfair procedures, including conducting of public hearings within a reasonable period of time and delivery of judgment by a competent and impartial tribunal) – in 130;
- the right to appeal against court decisions – in 124;
- the right to protection against self-incrimination (the right to remain silent in criminal proceedings), – in 114;
- prohibition of repeated prosecution and conviction for the same crime (double jeopardy, *non bis in idem*) – in 109;
- the right to reparation in the event of a miscarriage of justice – in 98;
- the right to have the trial conducted in a language they understand or the right to an interpreter – in 88;
- the right of the accused to be released from custody pending trial – in 68;
- the right to examine witnesses for the prosecution – in 66;
- the right of juveniles to special

[1] *Constitution*. URL: https://www.constituteproject.org (дата обращения: 01.07.2024); *Oxford Constitutions of the World*: fully-translated English-language versions of all the world's constitutions. URL: http://oxcon.ouplaw.com (accessed: 01.07.2024).

protection in criminal proceedings – in 62;

- the right to trial by jury or other forms of citizen participation in the administration of justice – in 48;

- due process guarantees – in 47;

- protection of crime victims – in 31;

- the right to seek judicial review of government actions or judicial decisions, – in 19;

- availability of a public registry of prisoners' names – in 11.

A similar attempt of analysis (though, with regard to the criminal procedure) was made in 1993 by Professor *Mahmoud Cherif Bassiouni*, President of the International Institute of Human Rights Law at DePaul University (USA) [17]. He obtained similar results, but with a smaller number of human rights in the catalogue and their lower quantitative prevalence, which is due to a smaller number of constitutions for the sample.

The results of the quantitative study of constitutional acts presented above, from our point of view already allows us to assert boldly and confidently that at the constitutional level a certain set of constitutional provisions enshrining subjective human rights in the field of justice can be traced consistently.

2.2. International Legal Framework

The mass adoption of constitutions in the late 19th and mid-20th centuries and the similarity of human rights language in many of them inevitably raise the question of the reasons for such similarity or even identity. The legal factors of what happened will be discussed further, but one of them requires attention already at this point. It seems that the semantic or even textual similarity of the wording of the constitutions of many states regarding justice is caused by the influence of the norms of international law on national legal systems, which in the 20th and 21st centuries has consistently followed the path of establishing certain minimum standards for the treatment of human beings by the state that are binding on states-parties. For this reason, it is worthwhile to turn to a brief (due to the repeated previous references to Russian and foreign scholarship on this issue) review of the international legal enshrinement of human rights in the field of justice, since we should mention the international legal acts known to practically every lawyer.

Thus, the ***Universal Declaration of Human Rights of 1948***[2] enshrines the right of everyone to an effective remedy by the competent national tribunals for violations of the fundamental rights conferred upon him by the constitution or by law (Art. 8), the right of everyone to have his case, concerning the determination of his rights and obligations or the validity of criminal charges against him, tried in full equality, publicly and with full fairness, by an independent and impartial tribunal (Art. 10), as well as the right to the presumption of innocence in criminal matters (Art. 11(1)), freedom from unjustified conviction and the prohibition of imposing a penalty more severe than what could have been imposed at the time the crime was committed (Art. 11(2)).

Similar provisions by implication are contained in another act of universal character – the ***International Covenant on Civil and Political Rights of 1966***. In Article 14 it is provided for equality of all before courts and tribunals, the right of everyone to a fair and public hearing by a competent, independent and impartial tribunal established by law (part. 1), the presumption of innocence (part 2), the broad

[2] Here and hereinafter, the official texts of international legal acts in Russian, available on the official UN website, have been used. See: Declarations, Conventions and other normative documents. Official website of the UN. URL: https://www.un.org/ru/documents/decl_conv/index.shtml (date of access 11.07.2024).

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rights of the accused, including the right to have adequate time and facilities for the preparation of his defense, to be tried without undue delay and in his presence, to defend himself personally or with the assistance of counsel of his choice, etc. (part 3), the right to have court decisions reviewed by a higher instance court according to law (part 4), the right to compensation in case of miscarriage of justice (part 6), freedom from being convicted again for the same offense (part 7).

Since the adoption of the Universal Declaration of Human Rights, the drafting and adoption of international human rights treaties has proceeded in two ways.

The first way is the establishment of regional systems for the protection of human rights. Thus, as a part of this path, the world has become aware of regional human rights conventions that enshrine similar legal provisions relating to justice. These are the [European] ***Convention for the Protection of Human Rights and Fundamental Freedoms of 1951*** (Art. 6), the ***American Convention on Human Rights*** (***San Jose Pact) of 1969*** (Arts. 8 and 9), the ***African Charter on Human and Peoples' Rights of 1981*** (Art. 7), the ***Arab [Cairo] Declaration of Human Rights of 2004*** (Art. 13), the ***Declaration of Human Rights of Southeast Asian Nations (ASEAN) of 2012*** (Art. 20). The similarity of these provisions has already been emphasized in the domestic scholarly literature [5, p. 23]. The provisions of these international treaties are further developed and clarified by the jurisprudence of interstate courts – the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights, which by itself needs deep understanding, analysis and, most importantly, comparison.

The second way implies the inclusion of human rights related norms in the sphere of justice in international treaties dealing with individual or even rather narrow thematic issues. Thus, the right of refugees and stateless persons to appeal to the court (access to justice) on equal footing with citizens of the state is enshrined in the ***Convention relating to the Status of Refugees of 1951*** (Art. 16) and the ***Convention relating to the Status of Stateless Persons of 1954*** (Art. 16), the right to equality before the law and the courts, the right to effective legal remedy in a nationally competent court - in the ***International Convention on the Elimination of All Forms of Racial Discrimination of 1965*** (paragraph “a” of Art. 5, Art. 6), the right of women to equal opportunities with men for legal protection before the court - in the ***Convention on the Elimination of All Forms of Discrimination against Women*** (Art. 2 (c)), the right of migrant workers and members of their families to equality with nationals of the state concerned before courts and tribunals, their right to a fair and public trial by a competent, independent and impartial tribunal established in accordance with the law – in the ***International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990*** (Art. 18). The right to access to justice is guaranteed to persons with disabilities by the ***Convention on the Rights of Persons with Disabilities, 2006*** (Art. 14). The list of such examples could go on for a long time, but it is already evident from the existing ones that international organizations recognize the importance of human rights in the sphere of justice in addressing systemic social problems through legal means, and that they have adopted a consistent and clear approach, covering the same set of justiciary rights in different conventions.

Exactly justiciary rights are enshrined in a supranational legal act, the ***Charter of Fundamental Rights of the European Union of 2000***, Chapter VI of which is entitled “Justice” and includes the right to an effective remedy

and a fair trial (Article 47), the presumption of innocence and the right to defense (Article 48), the principles of legality and proportionality of crimes and punishments (Article 49) and the right not to be tried twice for the same crime (Article 50).[3]

Assessing the totality of provisions on justice at the international level, one should notice their semantic similarity among themselves and with human rights enshrined at the constitutional level. The prevalence of these provisions allows us to assert that constitutional justiciary rights are not a speculative category that appeared in the minds of scholars, but an independent and even autonomous category of positive law in force, so it is possible and necessary to raise the question of the existence of an independent group of human rights in the field of justice.

3. Main Approaches to the Study of Constitutional Justiciary Rights (Toward a Comprehension of the Phenomenon)

Having established the existence of constitutional justiciary rights as a concept of the law in force, we can turn to the definition of the main approaches to their study, since it is important to move from external formal characteristics to the deep essence of the phenomenon of justiciary rights. Like any complex and multifaceted legal phenomenon, justiciary rights cannot be cognized from a single point of view, their essence should be revealed from different positions, identifying, for example, their concepts and systems, explanations of their origin.

3.1. Operational Concept of Justiciary Rights

A review of the constitutional and international legal enshrinement of justiciary rights allows us to note that they are human rights embodied in national constitutional acts, guaranteed in acts of international law, clarified and developed in national procedural legislation, exercised by persons defending their rights, freedoms and legitimate interests in any (usually adversarial) procedure aimed at consideration and resolution of social and legal disputes by courts (i.e. in judicial proceedings of various types) and on the basis of any substantive legal norm (and even in the absence of such a norm), and existing in the countries belonging to different legal systems, but building and (or) maintaining a regime of constitutionalism (aka a state of democratic rule of law, or, more precisely, a constitutional state, i.e. a state of victorious or winning constitutionalism).

The predicates “constitutional” and “justiciary” provide for the group of human rights under review with additional conceptual meanings reflecting the essence of these rights in a democratic state governed by the rule of law. Thus, *"constitutionality "* means not only the enshrinement of legal rights in acts of the constitutional level, but also their compliance with the first principles and other values of constitutionalism, their derivation from these principles, as well as their focus on the actual implementation of these principles in the state-society practices through justice.

"Justiciarity" means not only justice (*Justitia*) as a sphere of social relations, where these rights are implemented, but also their focus on achieving social justice in each specific case on the basis of the existing law through their implementation by their subjects and compliance by state bodies. Justiciary rights are designed to ensure, first of all, the fairness of judicial proceedings, but if courts strictly follow the provisions of rightful substantive laws and due to their close connection with the first principles of constitutionalism (first of all, the

[3] The Charter of Fundamental Rights of the European Union. European Parliament. URL: https://www.europarl.europa.eu/charter/default_en.htm (date of reference. 11.07.2024).

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prohibition of arbitrariness of public power, its restriction by law and the rule of law in the regulation of social relations), they can ensure the fairness of the substantive content of judicial decisions, i.e. substantive justice. These two semantic components are an important and even indispensable condition for the achievement of social justice in the state of the constitutionalism under construction or victorious constitutionalism by means of judicial procedure.

3.2. Origin and System of Judiciary Rights

Acts of constitutional and international legal nature enshrine normative provisions on justice or judicial power, which are formulated either as subjective rights or as principles of organization and operation of courts. Other approaches to the normative expression of the images of due justice are, probably, also admissible: for example, through the formulation of some first principles of natural justice or a simple statement of universal procedural rules. However, the use of the human rights construct seems preferable because, on a historical scale, it is the best way to ensure that these norms remain unchanged. While the provisions of the law can be and are dynamically changing with the development of society and the legal system following it, human rights, especially universally recognized human rights, due to their essential and inalienable nature, are practically much more protected from revision, including sequestration, than a set of ordinary sectoral legal norms contained in a code or other legal act. Besides, it is through this category that the duties of the state towards a person are clearly traced, while the category of a legal principle may not make such a distinction clearly, describing only the general structure of a particular legal relationship without specifying the ways of achieving such state of affairs. However, it is possible to derive a human right from the principle of law if this principle imposes on state bodies (for example, on the court) a duty (for example, to conduct public and in-person trials), and therefore the other party to this legal relationship (for example, citizens or organizations – participants to judicial proceedings) has the right to demand the fulfillment of this duty, and in its wake – upon fulfillment of this duty – the right to the subject of this duty (i.e., the public and in-person trial itself).

The origin of justiciary rights in a particular country may be (1) the property of own long-term legal development of specific countries, (2) the result of the reception of specific legal norms between different national legal systems, or (3) the fruit of the influence on national legal orders of global legal approaches to the definition of key features of justice, which were formed in specific countries and then spread to many other countries and partially enshrined at the international level. The latter explains the semantic identity of the wording of constitutional and international acts, when the former perceive the approaches of the latter.

The constitutional texts of different countries can be reduced to a common denominator (universalized) by quantitative and qualitative criteria: the first relates to the frequency of dissemination of these rights in acts of a constitutional or international nature and the time when these provisions were enshrined in national constitutions, and the second relates to their semantic similarity or even identity, considered without regard to textual design. Hence, the most globally widespread provisions (e.g., those enshrined in more than half of the world's countries) should be included in the system of justiciary rights.

When defining the system of justiciary rights, it is also important to take into account the sectoral aspect of the implementation of these rights. These human rights are

implemented in the sphere of justice, and therefore their realization should be associated with the institutions and branches of procedural law or, which is possible in some cases, with the institutions of organization of the judiciary (judicial administration).[4] Normative provisions concerning punishments and grounds for liability (the right to punishment for a crime on the basis of the existing law, freedom (protection) from retroactive force of laws that worsen the situation of a person) are mediated by the norms of criminal law, and therefore should not be included in the catalogue of justiciary rights at all or should be included, but as part of other rights of procedural nature (for example, the right to ensure the stability of judicial decision that became valid and enforceable)..

3.3. The Sociocultural Basis of Justiciary rights

The existence of justiciary rights throughout all major historical epochs can be explained both by their socio-historical and natural-law origin and by circumstances of a deeper, socio-cultural nature, which lie beyond the usual dry legal dogma. The semantic identity of the list of justiciary rights in different legal systems that implement the regime of constitutionalism is seen as a reflection in written law and legal doctrine of *the archetype of* justice, i.e., the ideas of the collective unconscious inherent in a particular society about a fair procedure for resolving various disputes on the basis of any rules (both legal rules and other norms and social regulators) with the participation of a third party, independent of the parties to the dispute, - the court.

The essence of the archetypicality of justiciary rights is that the same underlying ideas, which constitute the content of each of these rights, underlie analogues (similar or identical) institutions of different types of court proceedings or institutions of court organization, and they always remain unchanged and do not depend on political ideologies, government programs and views of legal doctrine, because they are based on the ideas of the collective unconscious about justice in general and fair dispute resolution procedures in particular.

The archetypicality of justiciary rights can be proven through a comprehensive analysis of the procedural forms of civil and criminal (later – administrative, arbitrage and constitutional) judicial proceedings in order to identify the representation in those forms of the entire catalogue of justiciary rights or most of them. This comprehensive analysis implies an examination of each justiciary right:

1) from a *historical-typological perspective*: justiciary rights should be represented at different historical stages and among different peoples in all historical and morphological typologies of the procedure.

2) from a *normative-value perspective*: justiciary rights should be broadly enshrined in acts at the constitutional and international levels;

3) from a *socio-cultural perspective*: the archetype of justice, which forms the framework of a set of justiciary rights, should find its manifestation in other spheres of social life related to the resolution of any disputes that exist outside of proceedings in state courts.

The identification of the social archetype as a phenomenon not only of law but also of deeply rooted culture can be implemented by analyzing and comparing administration of justice procedures in state courts and the practices of dispute resolution in proto-state or non-state practices of resolving or settling social disputes. Examples of the former are the ways of dispute resolution described by

[4] The author's full list of justiciary rights is given in the work: [16].

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ethnographers in primitive or communal societies; examples of the latter are domestic arbitration, international commercial arbitration, university academic ethics commissions, disciplinary bodies of sports federations, etc. The hypothesis that there is a connection between these dispute resolution practices constitutes an object of an independent interdisciplinary scholarly research.

4. Conclusion

The review of normative regulation conducted has shown that in Russia, as well as in most other foreign legal orders, there objectively exists and should be distinguished (recognized) an independent (most likely, the fifth) group of human rights, i.e. *justiciary rights* or human rights implemented in the field of *justice,* as part of the general legal status of the individual, defined by national constitutions and guaranteed by the main international legal acts. The characterization of this group of human rights from theoretical and applied research positions constitutes an object of an independent and large scale scholarly study, the results of which, of course, allow to improve the organization of Russian justice system, which is a highly demanded task of theory and practice nowadays.

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